FILE COPY

FILED
JUN 10 19
JAMES R. BROWNING

No. 913

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH L. SCLAFANI, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	18

CITATIONS

Cases:

Cobbledick v. *United States*, 309 U. S. 323	11
Gouled v. *United States*, 255 U. S. 298	14, 15
Hanson v. *United States*, 186 F. 2d 61	15
Harvey v. *United States*, 215 F. 2d 330	16
Lawn v. *United States*, 355 U. S. 339	11
Montgomery v. *United States*, 203 F. 2d 887	15
Mulloney v. *United States*, 79 F. 2d 566, certiorari denied, 296 U. S. 658	10, 11
Schino v. *United States*, 209 F. 2d 67, certiorari denied, 347 U. S. 937	17
Stanley v. *United States*, 245 F. 2d 427	16
Turner v. *United States*, 222 F. 2d 926	15
United States v. *Beacon Brass Co.*, 344 U. S. 43	16
United States v. *Frank*, 245 F. 2d 284	15
United States v. *Lawn*, 115 F. Supp. 674, appeal dismissed *sub nom. United States* v. *Roth*, 208 F. 2d 467	10, 11
United States v. *Monia*, 317 U. S. 424	10
United States v. *O'Connor*, 237 F. 2d 466	16, 17
United States v. *Werner*, 160 F. 2d 438	16
Wilson v. *United States*, 162 U. S. 613	16
Wilson v. *United States*, 221 U. S. 361	9, 11-12

Statutes:

Internal Revenue Code of 1939:	
Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145 (b))	2-3, 16
Sec. 3748 (26 U.S.C. 1952 ed., Sec. 3748)	16

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 7	3

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 913

JOSEPH L. SCLAFANI, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 19-35) is not yet reported. The opinion of the District Court, denying petitioner's pre-trial motions to dismiss the information and to dismiss certain counts thereof (Pet. 36-39), is reported at 126 F. Supp. 654.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1959 (Pet. 19), and on April 30, 1959, the time for filing a petition for a writ of certiorari

was extended to May 14, 1959, by order of Mr. Justice Harlan. The petition was filed on May 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the information should have been dismissed because, after it was filed, petitioner was required to testify before a grand jury in response to subpoenas calling for (a) the production of corporate records and (b) testimony relating to those records.

2. Whether statements purporting to set forth petitioner's net worth, which he submitted to the Treasury agents near the beginning of the investigation, should have been excluded from evidence because the agents had not advised him that he might be prosecuted criminally.

3. Whether prosecution on Counts IV and V of the information was barred by the statute of limitations.

4. Whether petitioner was prejudiced by the District Court's denial of his motion for a bill of particulars.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chap-

ter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

STATEMENT

On February 26, 1954, there was filed against petitioner in the United States District Court for the Eastern District of New York an eight-count information[1] alleging that he had wilfully attempted to evade substantial parts of (1) his individual income taxes for the years 1945 through 1949, and (2) the income taxes of Joseph L. Sclafani, Inc., for the years 1947 through 1949. (R. 2819-2824.)[2] On February 7, 1955, petitioner entered pleas of guilty to Count III (evasion of the corporation's 1949 tax) and Count VI (evasion of petitioner's 1947 tax). (R. 2866.) In accordance with a previous understanding, petitioner's representatives were then furnished with

[1] The petitioner waived indictment under Rule 7(b) of the Federal Rules of Criminal Procedure. (R. 2826.)

[2] The record in this case consists of three pages covering the District Court's docket entries, lettered A, B and C, and a typewritten transcript of the trial and pre-trial proceedings, with pages numbered 1 through 2887.

a copy of the revenue agent's report, which disclosed petitioner's net income and tax deficiencies, as reconstructed by the Government, in detail. (R. 1508, 2866-2867.) Thereafter, on March 10, 1955, petitioner withdrew his plea of guilty, with the consent of the court, and entered a plea of not guilty. (R. B.)

After a jury trial lasting six weeks, petitioner was found guilty on all counts except Count II (involving the alleged attempted evasion of the corporation's 1948 taxes), which was dismissed by the court during the trial. (R. 2686, 2799-2800.) On April 27, 1955, petitioner was fined $5,000 on Count I and $5,000 on Count VI, and sentenced to concurrent 15-months prison terms on all seven counts on which he had been convicted. (R. 2815-2816, 2883.)

The Government's proof, which was based on the net worth-expenditures method, bolstered by proof of specific items of unreported income, showed that the true income and tax liability of petitioner and Joseph L. Sclafani, Inc., during the prosecution years compared with the amounts reported on the tax returns as follows (Govt. Exs. 358, 358A, 381, 389):

Year	Net Income		Tax Liability	
Petitioner	Reported	Corrected	Reported	Corrected
1945	$ 2,980.89	$ 53,547.02	$ 255.60	$28,194.69
1946	3,363.29	36,542.38	259.03	14,681.04
1947	3,152.19	68,019.23	218.92	33,699.05
1948	4,342.49	5,303.67	322.46	482.02
1949	4,159.44	27,268.71	292.06	6,272.72
	$17,998.30	$190,681.01	$1,348.07	$83,329.52
Joseph L. Sclafani, Inc.				
1947	$ 2,921.43	$ 78,851.43	$ 613.50	$29,963.54
1949	4,884.90	25,616.58	1,025.83	6,076.79
	$ 7,806.33	$104,468.01	$1,639.33	$36,040.33

During the years in question all of the stock of the corporation (which was engaged in the wholesale grocery business) was owned by petitioner and members of his family, petitioner being the largest single stockholder. (R. 1430.) Although petitioner was the president and operating head of the business, he listed his occupation on his individual income tax returns as "Salesman" or Travelling Salesman". (Govt. Exs. 1-5, 8-12.)

In 1950, an internal revenue agent assigned to make a routine audit of the corporation's 1947 return discovered disbursements totalling $149,000 on the corporate books, which ostensibly reflected payments to suppliers of merchandise, but in fact represented funds paid over to petitioner. (R. 110-112,

117-119.)[3] All of the checks making up the $149,000 were either cashed by petitioner, deposited to petitioner's personal bank accounts, or redeposited in the corporation's bank account and credited as loans payable to petitioner. (R. 123-126.) The Treasury agent took the matter up with petitioner, who explained that he was simply reimbursing himself for personal funds he had advanced to the corporation in 1946 to pay for merchandise purchased in that year.[4] (R. 130, 133.) The agent asked petitioner where he had obtained such a large sum of money to advance to the corporation, and petitioner explained that he had received a gift of $125,000 in currency from his father-in-law, Peter Rinelli, in 1938. (R. 128.) Rinelli had died in 1939. (R. 1384.)

After discussing the situation with his superior in the Internal Revenue Service, the revenue agent asked petitioner for a net worth statement to substantiate his contention. (R. 148.) Petitioner completed the blank net worth schedule which the agent had furnished him, signed and swore to it, and filed it with the Internal Revenue Service in June, 1950. (R. 1189, 1211-1212, 2196-2198; Govt. Ex. 22.) During the ensuing months petitioner was given at least two opportunities to correct any mistakes and supply any omissions, but with two insignificant exceptions he adhered to the position that it was a

---

[3] During the years 1945 through 1949, the corporation declared no formal dividends. (Govt. Exs. 8-12.)

[4] The corporation's canceled checks for 1946 and its cash receipts and disbursements book for 1946 were never shown to the agents. (R. 1250, 1290.)

true and correct statement. (R. 1171, 1174-1179, 1183, 1230, 1246-1247; Govt. Ex. 22a.)

After a special agent had been called into the case to collaborate with the revenue agent, petitioner repeated and elaborated upon the contention that he had received a $125,000 cash gift from his father-in-law. (R. 1170-1171, 1230-1232, 1243.) The Government introduced evidence tending to show that no such gift could possibly have been made. (R. 1240-1243, 1380-1386, 1390-1399, 1410-1424.) As for the net worth statement submitted by petitioner, which he swore was "true and complete in every respect" (Govt. Ex. 22), the Government proved conclusively that it omitted substantial assets. The statement listed accounts in two banks; the agents discovered undisclosed accounts in five other banks. The statement listed investments in three businesses; the agents discovered investments in two other businesses, as well as a $5,500 investment, also undisclosed, in a mortgage, and lesser amounts invested in common stocks. The statement disclosed $12,000 invested in Government bonds; the agents unearthed a total investment (as of the end of 1948) in such bonds of $63,793.75. The statement disclosed four life insurance policies; the agents discovered eleven additional policies. (R. 1252-1253, 1367-1379; Govt. Ex. 344.) Petitioner's statement showed a decrease in his net worth between the end of 1944 and the end of 1948. (Govt. Ex. 22, 22a.) The Government's proof showed an increase in excess of $200,000. (Govt. Ex. 358.) After the special agent told petitioner that he had discovered these additional

assets, petitioner agreed, in the presence of his attorneys, to furnish a list of them, but never did so. (R. 1272-1275.)

ARGUMENT

1. Petitioner contends (Pet. 7-11) that his conviction must be reversed because he obtained immunity from prosecution when he was compelled, after the information had been filed against him, to produce and identify before the grand jury certain corporate books and records, and to explain the absence of any such records not produced. The point is without merit. The facts are as follows: Defendant moved in the District Court to dismiss the information, attaching an affidavit by his attorney which alleged that on July 23, 1954, petitioner was served with a *subpoena duces tecum* requiring him to appear before a federal grand jury sitting in the district, and to bring with him certain books and records of Joseph L. Sclafani, Inc., pertaining to transactions of that corporation for the years 1943 through 1949; that, three days later, petitioner was served with a *subpoena ad testificandum*, returnable on the same date as the *subpoena duces tecum;* that the affiant advised petitioner to refuse to answer any questions whatsoever on the ground that he might incriminate himself; that, when petitioner followed this advice, he was taken before Judge Bruchhausen, who ordered him to answer the particular questions put to him because "no claim of privilege under the Fifth Amendment is substantiated with respect to the questions pertaining to the

production of these books, their authentication and identification, and the questions as to the missing corporate books and records" (R. 2845); and that petitioner was thereafter questioned before the grand jury on July 29, 1954, and July 30, 1954 (R. 2841-2846).[5] The District Court (Rayfiel, J.) held that petitioner had been "clearly obliged" to comply with Judge Bruchhausen's order by *Wilson* v. *United States*, 221 U. S. 361 (Pet. 37); that nowhere in the moving papers was any claim made that petitioner "was compelled or even asked to answer any question which constituted a deprivation of his constitutional privilege against self-incrimination" (Pet. 37-38); and that petitioner had failed completely to show any violation of his rights or any impropriety in the proceedings leading to the filing of the information. (Pet. 38.) The Court of Appeals, scrutinizing the trial record, held that in any event petitioner has no valid complaint because "no injury resulted from the alleged abuse." (Pet. 33.)[6]

Petitioner urges reversal on two theories: (a) that the prosecutor abused the grand jury process by questioning petitioner before that body while criminal charges were pending against him; and (b) that petitioner's testimony before the grand jury re-

---

[5] As petitioner points out (Pet. 8, fn. 3), the transcript of his testimony before the grand jury was marked as Court's Exhibit I for possible use by the appellate courts. We have lodged it with the Clerk of this Court.

[6] The Court of Appeals discussed the factual situation in detail. (Pet. 30-34.)

lating to Government's Exhibits 366 and 367 was used against him at the trial.

(a) Immunity from prosecution, at least in the federal system, can be conferred only by statute (cf. *United States* v. *Monia*, 317 U. S. 424); none of the authorities cited by petitioner (Pet. 11, fn. 5) supports his thesis that he acquired immunity when he testified before the grand jury.

Petitioner's main reliance is upon *Mulloney* v. *United States*, 79 F. 2d 566, 579 (C. A. 1st), certiorari denied, 296 U.S. 658, and *United States* v. *Lawn*, 115 F. Supp. 674, (S.D. N.Y.), appeal dismissed as untimely *sub nom. United States* v. *Roth*, 208 F. 2d 467 (C. A. 2d). The asserted conflict (Pet. 8) between the instant case and the *Mulloney* case does not exist. It is not correct to say, as petitioner does, that in *Mulloney* the First Circuit "adopted the lower Court's charge to the Jury" (Pet. 8), for all it did was to quote from the charge (79 F. 2d at 578-579)[1] and then observe (p. 580) that "in some

[1] In the portion of the charge relied upon by petitioner the trial judge was rambling far from the facts of that case and gratuitously discussing a hypothetical situation: "If Mr. Mulloney had been a party when he was called as a witness, if, for instance, a complaint and warrant had been issued against him and he was under bail to await the action of the grand jury, and after he had been called and sworn he had been asked how old he was, or how much he weighed or any inconsequential question and he had been compelled to answer, it would have been a violation of his rights then and there, and *any indictment against him would have been void.* * * * But here, where an investigation had not then resulted in a criminal prosecution against any one, certain questions could be asked without infringing his Con-

respects it was too favorable to the defendant, but of this he cannot complain." Nothing said by the First Circuit in *Mulloney* is out of harmony with the case at bar, and to the extent that the remarks of the trial judge there may be of comfort to petitioner, they are distinguishable on precisely the same ground as the Court of Appeals here distinguished *United States* v. *Lawn*, *supra*, *i.e.*, that "In such cases the defendant's independent interest in not being subject to a public charge of crime which was improperly procured is the basis of reversal. Here, however, the defendant voluntarily surrendered the protection of a Grand Jury proceeding against himself by his waiver of indictment and he does not challenge the fairness of that waiver." (Pet. 31.) In short, whatever vitality *United States* v. *Lawn*, *supra*, may retain in light of *Lawn* v. *United States*, 355 U. S. 339, 349 (see fn. 7, *supra*), petitioner can have no valid complaint here because the grand jury did not indict him.[8]

---

stitutional rights, depending upon whether or not his answers would be injurious to him." (Emphasis supplied.) *Mulloney* v. *United States*, 79 F. 2d 566, 579, (C.A. 1st). This is not the law. An indictment returned by a legally constituted, unbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits. *Lawn* v. *United States*, 355 U. S. 339, 349, and cases cited.

[8] If petitioner was of the opinion that the Government was abusing the processes of the grand jury by calling him to produce documents and testify, he should have moved to quash the subpoena (cf. *Cobbledick* v. *United States*, 309 U. S. 323), though any such effort would seem to have been doomed to failure, corporate documents being involved (*Wil-*

(b) Equally without merit is the due process argument (Pet. 10) that the Government improperly introduced into evidence Government's Exhibits 366 and 367, and commented on petitioner's testimony before the grand jury with respect to them.[9] Those documents, consisting of two receipts signed by one Zerillo for monies advanced to him by the corporation (R. 1517-1528, 2034-2035), are plainly corporate records and hence not within the scope of the privilege against self-incrimination. Moreover, they were voluntarily turned over to the Treasury agents by petitioner near the beginning of the investigation, years before the grand jury proceedings. (R. 1520, 1521, 1522, 1526-1528; Govt. Ex. 22.) Petitioner complains (Pet. 10) that he was "questioned before the Grand Jury" about these exhibits, but fails to add that he refused to answer the questions (contending that the receipts were personal in nature) and that the Government attorney then discontinued such questions (R. 2031-2033, 2038-2039).[10]

---

son v. *United States*, 221 U. S. 361). Moreover, for all that appears the grand jury may have been engaged not in assisting the prosecutor in preparing for trial, as petitioner surmises, but in considering the advisability of indicting other persons who may have been implicated in the large-scale tax fraud shown here.

[9] These are the only specific contentions petitioner makes with respect to improper use of evidence at the trial.

[10] But, says petitioner (Pet. 10), the very fact that he claimed before the grand jury that the receipts constituted personal records was commented upon by the prosecutor at the trial. This appears to refer to the statement made in the course of the Government's summation to the jury that

2. Petitioner urges (Pet. 11-13) that the net worth statement (Govt. Ex. 22) and other records [11] he gave the Treasury agents near the beginning of the investigation should have been suppressed because they were obtained by deceit (and hence by illegal search and seizure) in that the agents failed to advise him that the case was assuming a criminal aspect. The contention is without substance. The pertinent facts are as follows: In May, 1950, Internal Revenue Agent Sonkin, having been assigned to audit the 1947 tax return of the corporation, called petitioner for an appointment. He advised petitioner of his purpose and received his permission to examine the relevant books and records. Sonkin soon discovered the $149,000 of corporate checks ostensibly paid to suppliers of merchandise but actually diverted to petitioner's own use or credited to him as loans on the corporate books.

---

petitioner claimed those advances of funds to be "personal assets". (R. 2635.) All the prosecutor was doing, however, was reminding the jury of the position that petitioner had taken from the very beginning of the investigation, *i.e.*, that the amounts due from Zerillo's Riverbank Canning company were repayable to petitioner personally even though advanced by the corporation. (R. 1518-1520, 1526.) They were shown as assets of petitioner as of the beginning of each of the first two prosecution years on the net worth statement submitted by petitioner to the Treasury agents in June, 1950, four years before the grand jury proceedings. (*Supra*, pp. 6-7; Govt. Ex. 22.) The prosecutor was not referring to petitioner's testimony before that body.

[11] The only personal record shown to the agents, aside from the net worth statements, was a transcript of one of petitioner's numerous bank accounts for the year 1947. (*Supra*, p. 7; R. 1231-1235.)

(*Supra*, p. 5.) Sonkin discussed this matter with petitioner and, after being told about the alleged $125,000 cash gift from Rinelli (*supra*, p. 6), asked petitioner to submit a statement of his net worth. Petitioner did so in June, 1950. In August, 1950, Silbert, a special agent specializing in tax fraud cases, was assigned to collaborate in the investigation. Silbert and Sonkin called upon petitioner, and Silbert introduced himself as a special agent. Silbert warned petitioner of his constitutional rights, and petitioner replied that he was familiar with them. Silbert and petitioner discussed petitioner's net worth statement in detail, after which Silbert requested additional information as to his net worth and expenditures. Petitioner furnished it in writing. (R. 109-112, 127-129, 147, 174-175, 195-197, 203-204, 1170-1179, 1198-1204, 2198-2199; Govt. Exs. 22, 22a.)[12]

Petitioner, relying on *Gouled* v. *United States*, 255 U. S. 298, 305, argues that the net worth statements he furnished the agents should have been excluded from evidence because at the time of their submission the inquiry had assumed a new dimension in that it then had criminal as well as civil aspects, and that he should have been so advised. The *Gouled* case furnishes no support for the argument; the language quoted from that case (Pet. 12-13) relates to docu-

[12] When the additional net worth information furnished to Silbert by petitioner was offered in evidence, petitioner asked for and received a hearing, outside the jury's presence, on its admissibility. The trial judge concluded that no constitutional rights had been infringed, and denied the motion to suppress. (R. 1189-1219.)

ments stolen from the defendant by an army intelligence agent with whom the defendant was acquainted and who, acting under the direction of his superiors, gained admission to defendant's office under the pretense of making a friendly call (255 U. S. at 304). Plainly the Court of Appeals was right in holding (Pet. 30) that "no such deception is inherent in Agent Sonkin's concededly truthful description of his purpose as a 'routine audit' * * *." Certainly petitioner knew from the outset that if the agents found the kind of flagrant tax evasion shown here there was a reasonable chance that he would face criminal prosecution. The holding here is in harmony with the holdings of other Courts of Appeals which have passed upon the point. *Turner* v. *United States*, 222 F. 2d 926, 931 (C. A. 4th), and cases cited; *United States* v. *Frank*, 245 F. 2d 284, 285-286 (C. A. 3d); *Montgomery* v. *United States*, 203 F. 2d 887, 892-893 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 64-65 (C. A. 8th).

3. Petitioner's third contention, that Counts IV and V of the information were barred by the statute of limitations (Pet. 13-15), is plainly lacking in substance. Indeed, it need not be considered at all because no separate fines were imposed on those counts and the prison sentences are concurrent with those based on the other five counts on which petitioner was convicted. (*Supra*, p. 4.)[13]

[13] The statement (Pet. 13) that the evidence relating to those counts, *i.e.*, the falsity of the net worth statements submitted to the Treasury agents by petitioner (*supra*, pp. 6-7), would have been inadmissible if they had been dis-

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

JUNE, 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959 — 508984 1559